IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Lucas, Prendergast, Albright, Gibson, & Newman,	:	
Plaintiff-Appellee,	:	No. 95APE12-1663
v.	:	(REGULAR CALENDAR)
Florence Zschach and Marylou Zschach, aka Mary Lou Zschach,	:	
Defendants-Appellants,	:	
Margaret Ann Sloan,	:	
Defendant-Appellee.	:	

OPINION

Rendered on September 12, 1996

Shuler, Plank, Morgan & Brahm, and *Gordon P. Shuler,* for appellee Lucas, Prendergast, Albright, Gibson & Newman

John F. Heath, for appellants.

Emens, Kegler, Brown, Hill & Ritter, and *Anthony C. White,* for appellee Margaret Ann Sloan.

APPEAL from the Franklin County Court of Common Pleas.

PETREE, P.J.

This matter is before this court upon appeal of defendants, Florence and Marylou Zschach ("defendants"), trustees of a testamentary trust created by the will of Clara K. Wirthman, from a judgment of the Franklin County Court of Common Pleas in favor of plaintiff, the law firm of Lucas, Prendergast, Albright, Gibson and Newman, and Robert E. Albright. On appeal, defendants set forth thirteen assignments of error as follows:

> "I. The Court erred in not recusing himself from this case.
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> "II. The Court erred in refusing to adjust the Clerk's original case schedule with respect to the trial date.
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> "III. The Court erred in refusing to add Appellants as parties in their capacity as individuals.
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> "IV. The Court erred-in not impaneling a jury.
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> "V. The Court erred in thrice refusing an "ad diem" continuance.
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> "VI. The Court erred in admitting into evidence self-serving unsworn statements of Albright and others.
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> "VII. The Court erred in refusing Marylou Zschach to refresh her recollection by referring to her notes.
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> "VIII. The Court erred in refusing the continuation of the direct testimony of a party, Marylou Zschach.
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> "IX. The Court erred in striking certain testimony of H. James Graham.

"X. The Court erred in refusing admission into evidence of an audio-tape for impeachment purposes during Marylou's redirect testimony and during her surrebuttal.

"XI. The Court erred in dismissing Margaret Slone from the case.

"XII. Alternatively to Assignment #3, the General Division of the Common Pleas Court lacked 'subject matter' jurisdiction, and so the Court erred in its order of October 11, 1995.

"XIII. The Court's judgment in favor of Appellees is against the manifest weight of the evidence."

On August 25, 1994, plaintiff Lucas, Prendergast, Albright, Gibson & Newman filed a complaint seeking payment in the amount of $30,893.04 plus interest for legal services rendered in connection with the sale a 29-acre parcel of real estate located at 3800 West Henderson Road, Columbus, Ohio. The real estate is held by defendants and Margaret Slone as trustees of a testamentary trust created by the will of Clara K. Wirthman, the mother of defendant Florence Zschach and the grandmother of defendant Marylou Zschach and Margaret Slone.

The clerk of courts prepared a case schedule pursuant to Loc.R. 39.01 of the Franklin County Court of Common Pleas at the time plaintiff filed its complaint. Pursuant to Loc.R. 37.02, the case was placed on the 12-month primary time track. Accordingly, the trial was scheduled for August 24, 1995.

On September 14, 1994, defendants, *pro se*, responded to plaintiff's complaint by filing an answer and counterclaim. The answer raised the claim of legal malpractice on

the part of Robert E. Albright, a partner in plaintiff law firm, as an affirmative defense. The counterclaim also asserted additional claims for negligent infliction of emotional distress, intentional infliction of emotional distress and defamation. Plaintiff's reply to the counterclaim was filed on October 7, 1994. Trustee Margaret Slone filed a separate answer on September 22, 1994.

On February 1, 1995, John F. Heath entered his appearance as counsel of record for defendants. Approximately three weeks later, on February 24, 1995, counsel for defendants filed a motion, pursuant to Loc.R. 39.04, to amend the clerk's original case schedule, seeking an extension of five months on all the dates set forth in the original case schedule. Plaintiff had no objection to an extension of time for identifying witnesses, but did object to extending the subsequent dates identified in the case schedule, including the August 24, 1995 trial date. The trial court overruled the motion, noting that, while the interim dates were "somewhat flexible," the case would remain scheduled for trial on August 24, 1995.

On March 23, 1995, defendants, noting that no jury demand had previously been made by any of the parties in the case, filed a motion requesting leave to amend the prayer for relief contained in the counterclaim to include a claim for punitive damages, and to have that claim determined by a jury. The trial court overruled this motion on the grounds that it was unnecessary to amend the prayer for relief under Civ.R. 54(C). In addition, the trial court determined that defendants had waived the right to a jury trial by failing to make such request in a timely manner. Defendants appealed that decision to this

court. By journal entry dated July 12, 1995, this court dismissed the appeal for lack of a final appealable order.

Thereafter, on August 11, 1995, defendants filed a motion to dismiss contending that the Franklin County Common Pleas Court lacked subject matter jurisdiction over the case and that the case should be transferred to the Probate Division of the Franklin County Court of Common Pleas. While that motion was pending, defendants filed a motion for a continuance. The continuance was granted and trial was rescheduled for November 6, 1995. Thereafter, the trial court overruled defendants' motion to dismiss.

The case was tried to the court on November 6 and 7, 1995. At the conclusion of plaintiff's case, Slone was dismissed as a party defendant. Ultimately, the trial court found in favor of plaintiff on its claim for attorney fees and against defendants on their counterclaim.

At defendants' request, the trial court filed findings of fact and conclusions of law. The court journalized its decision on November 30, 1995.[1] Defendants have timely appealed.

By the first assignment of error, defendants contend that the trial judge erred in not recusing himself from the case. The authority to pass upon the disqualification of a judge of the court of common pleas is vested solely in the Chief Justice of the Ohio Supreme Court or his designee.

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[1] Although the case history from the clerk of courts indicates that the judgment entry was filed on November 10, 1995, this appears to be a misreading of the file-stamp, which indicates that the entry was filed on November 30, 1995.

Beer v. Griffith (1978), 54 Ohio St.2d 440; *Kettering v. Berger* (1982), 4 Ohio App.3d 254, 255; *State v. Dougherty* (1994), 99 Ohio App.3d 265, 268.

R.C. 2701.03 provides the procedure for seeking disqualification and states, in relevant part:

> "When a judge of the court of common pleas is interested in a cause or matter pending before the court, is related to, or has a bias or prejudice either for or against, a party to a matter or cause pending before the court or his counsel, or is otherwise disqualified to sit * * * any party may file an affidavit with the clerk of the supreme court setting forth the fact of the interest, bias, prejudice, or disqualification. * * * "

Thus, a court of appeals is without authority to render a decision with regard to disqualification or to void a trial court's judgment on that basis. *Dougherty* at 269; *State v. Ramos* (1993), 88 Ohio App.3d 394, 398.[2] Accordingly, the first assignment of error is overruled.

By the second assignment of error, defendants argue that the trial court abused its discretion in refusing to amend the case schedule and postpone the trial to a reasonable time, more convenient to defendants. Defendants contend that more time was needed for conducting interviews of and collecting documents from their thirty prospective witnesses.

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[2] Although without jurisdiction to determine disqualification, we note that the record contains no affidavit as required by R.C. 2701.03.

Defendants' motion is essentially a motion for a continuance of the trial date. Loc.R. 39.04 of the Franklin County Court of Common Pleas states:

> "The Trial Judge, either on motion of a party or sua sponte may modify any date in the Case Schedule for good cause and on terms as are just * * * ."

In *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 9, the Supreme Court of Ohio stated that the decision whether or not to grant a continuance is within the sound discretion of the trial court. An abuse of discretion connotes more than an error of law; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

At the time defendants' motion to amend the case schedule was filed, defendants were not in compliance with the original case schedule, having failed to file an initial disclosure of witnesses. Furthermore, after entering his appearance as counsel of record, defense counsel did not file the motion to amend the case schedule for approximately three weeks. Moreover, at the time the motion was filed, defense counsel still had six months to prepare for trial. Although the trial court refused to continue the trial date, it specifically stated that its ruling on any interim dates was flexible; however, the record reveals that defense counsel failed to request extensions on any of these interim dates, suggesting that counsel did not need additional time to prepare the case. Indeed, the record reflects that defense counsel did not schedule any depositions, nor serve any written discovery requests.

In addition, defendants were subsequently granted a continuance of the trial date to November 6, 1995, which provided defense counsel nearly ten months from the time he entered his appearance as counsel of record to prepare his case. Given defendants' failure to comply with the original case schedule, counsel's failure to request additional extensions of time, and the continuance of the trial for over two and one half months, the trial court did not abuse its discretion in failing to grant defendants' motion to amend the case schedule. Accordingly, defendants' second assignment of error is overruled.

By the third assignment of error, defendants contend that the trial court erred in overruling their motion to join themselves as individual defendants in this action. Although this assignment of error is labeled "Non-Joinder of Appellants as Individuals," defendants essentially argue that the trial court erred in dismissing their claims for intentional infliction of emotional distress, negligent infliction of emotional distress and defamation.

Defendants' counterclaim alleged four causes of action. The first was a claim for legal malpractice. The underlying basis for the legal malpractice claim was alleged to be that plaintiff Albright misrepresented defendants' interests in the sale of the trust property. The second and third causes of action, respectively, were for intentional and negligent infliction of emotional distress. These claims were allegedly based on the matter in which plaintiff Albright treated defendants throughout the course of the legal representation. The fourth cause of action contained in the counterclaim was a claim for

defamation. This claim was based on a newspaper comment allegedly attributed to plaintiff Albright regarding the sale of the trust property. In addition to the answer and counterclaim, defendants filed a motion to join Albright as a plaintiff and to add themselves as individual defendants. By decision and entry dated October 26, 1994, the trial court concluded that defendants could join Albright as a party pursuant to Civ.R. 20. However, the trial court denied the motion to add defendants as individual defendants on the basis that the defendants were acting in their capacity as trustees at the time of the alleged injury. In our view, the trial court's rulings suggest that, although defendants' claims for emotional distress and defamation were to remain as part of the case, joinder of defendants as individuals was unnecessary because they had already filed these claims in their capacity as trustees.

However, during the course of the trial, the trial court and counsel for both parties agreed that the trial court's ruling of October 26, 1994 removed defendants' claims for emotional distress and defamation; however, counsel for defendants objected to the trial court's ruling.

It appears that the trial court, as well as all parties to the action, were under the erroneous impression that the trial court's October 26, 1994 ruling removed defendants' claims for emotional distress and defamation from the case. Indeed, the trial court's findings of fact and conclusions of law do not mention any of defendants' claims other than the claim for legal malpractice. As previously noted, our interpretation of the court's ruling is that defendants' individual claims were to remain as part of

the case, but it was unnecessary to add defendants as individual parties.

However, given the nature of the relationship of the parties and the facts as they occurred in this case, we are unable to see how any error made by the trial court caused prejudice to defendants. Given the specific findings made by the trial court, even though it did not rule specifically on the claims for emotional distress and defamation, it is impossible as a matter of law for those claims to have survived the dismissal of this malpractice action.

Defendants' claims for intentional and negligent infliction of emotional distress and defamation were all based solely upon conduct alleged to have occurred during plaintiff Albright's alleged misrepresentation of defendants. Thus, these claims were derivative of defendants' underlying claim for legal malpractice. If Albright's actions did not rise to the level of malpractice, as the emotional distress and defamation arose from that representation, the claims clearly could not survive on their own as pled in this case.

However, we must caution that our analysis of this issue is fact specific to this case. Not in all cases, necessarily, would claims for emotional distress and defamation be derivative of a claim for legal malpractice. However, as the facts and the law are applied to this case, they are derivative. Accordingly, the third assignment of error is overruled.

By the fourth assignment of error, defendants contend that the trial court erred in proceeding to trial without a jury where no affirmative waiver of the right to a jury trial appears in the record.

Civ.R. 38 provides in part:

"**(A) Right preserved.** The right to trial by jury shall be preserved to the parties inviolate.

"**(B) Demand.** Any party may demand a trial by jury on any issue triable of right by a jury by serving upon the other parties a demand therefor at any time after the commencement of the action and not later than fourteen days after the service of the last pleading directed to such issue. * * * "

" * * *

"**(D) Waiver.** The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(D) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

"The failure of a party to timely serve his demand for a jury trial as required by the Civil Rules constitutes a waiver by him of a trial by jury." *Ferguson v. Johnson* (1984), 15 Ohio App.3d 143, 145. After plaintiff filed the complaint on August 25, 1994, defendants filed an answer and counterclaim on September 14, 1994. Sloan filed her separate answer on September 22, 1994. Pursuant to Civ.R. 12(A)(2), plaintiff was required to serve a reply to the counterclaim in the answer within twenty-eight days after service of the answer. Plaintiff complied with this requirement when it filed its reply on October 7, 1994. Under the above-quoted provision of Civ.R. 38(B), defendants would have had fourteen days thereafter, or until October 21, 1994, to demand a trial by jury. No such demand was made during this time, nor had any of the

aforementioned pleadings contained a jury demand. Thus, pursuant to Civ.R. 38(D), defendants' right to a jury trial was waived. However, some five months later, defendants filed a motion for leave to amend their counterclaim to include a claim for punitive damages and to have that claim heard by a jury.

Defendants first argue that their failure to timely demand a jury trial should be excused because they filed their answer and counterclaim *pro se* and did not realize that a jury demand should have been included in the pleading. Defendants' argument is without merit. As noted in *Meyers v. First Natl. Bank* (1981), 3 Ohio App.3d 209:

> "Appellants' argument that as *pro se* civil litigants they should receive special consideration and not be bound by the same rules as civil litigants represented by counsel is against the weight of Ohio as well as national authority. *Pro se* civil litigants are bound by the same rules and procedures as those litigants who retain counsel. They are not to be accorded greater rights and must accept the results of their own mistakes and errors." *Id.* at 210.

Thus, we conclude that defendants, even though *pro se*, were bound by the procedural requirements set forth in Civ.R. 38(B), and were required to demand a jury trial within fourteen days after service of plaintiff's reply to the counterclaim. Defendants' failure to do so constitutes a waiver of their right to a jury trial.

Defendants next argue that, because their amended counterclaim set forth a new issue of material fact, their right to a jury trial was revived. We disagree.

Where new jury issues are created by amendment, a party may properly demand a jury trial. *Ferguson, supra,* at 145. However, an amended pleading which neither changes the nature of the case nor introduces new issues does not renew that right. *Id.* The term "new issues" means "new issues of fact and not new theories of recovery." *id.* citing *Guajardo v. Estelle* (C.A.5, 1978), 580 F.2d 748. When an amendment raises a new issue of law, not of fact, the trial court may properly strike a jury demand. *Knoll Group Mgt. Co. v. Wolfe* (June 28, 1994), Adams App. No. 93CA-553, unreported.

Upon review of defendants' amended counterclaim, we conclude that no new issue of fact was raised. Defendants' proposed amendment sets forth the same cause of action as set forth in the original counterclaim, that is, legal malpractice, albeit in greater detail. The only difference in the amended counterclaim is that defendants now claim that plaintiff's conduct gives rise to a claim for punitive damages, which were not pleaded in the original counterclaim. Defendants claim for punitive damages presents only a "new theory of recovery," not a "new issue of fact." Because it was unnecessary to amend the counterclaim to include a claim for punitive damages under Civ.R. 54(C), the trial court did not err in overruling the motion to amend. (Punitive damages may be awarded even if such damages are not requested, "as long as the total award does not exceed the compensatory request," pursuant to Civ.R. 54[C]. *Lance v. Bowe* (1994), 98 Ohio App.3d 202, 209.) Since defendants' amended pleading did not raise a new issue of fact, the trial court properly struck the jury demand. *Knoll, supra.*

Defendants' final argument under this assignment of error is that even if they did not comply with Civ.R. 38(B), the trial court should have granted their demand for a jury trial pursuant to Civ.R. 39(B).

Civ.R. 39(B) provides:

> **"By the court.** Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues."

Civ.R. 39(B) provides that it is within the trial court's discretion to grant a late demand for a jury trial; thus, this court will not overrule the trial court's decision absent an abuse of that discretion.

The fact that plaintiff would not be prejudiced by a jury trial is not enough to require the trial court to permit defendants' request. *Ferguson v. Strader* (1994), 94 Ohio App.3d 622, 626. Moreover, in *Suburban Community Hosp. v. Lindquist* (Dec. 24, 1980), Cuyahoga App. No. 42079, unreported (reversed on other grounds, *Suburban Community Hospital v. Linquist* (1982), 69 Ohio St.2d 302), the appellate court upheld a lower court decision denying a motion for a jury trial pursuant to Civ.R. 39(B), noting that the moving party's request merely asserted the presence of excusable inadvertence and oversight, but failed to explain how the absence of a jury would prejudice his case. Marylou Zschach's affidavit, which is attached to defendants' motion, merely reiterates that she was unaware that she was required to demand a jury trial at the time she filed her answer and counterclaim; however,

there is no explanation as to how the case might be harmed or prejudiced by a failure to have the case tried to a jury.

For all the foregoing reasons, we conclude that the trial court's denial of defendants' jury demand did not amount to an abuse of discretion. Defendants' fourth assignment of error is overruled.

By the fifth assignment of error, defendants' contend that the trial court abused its discretion in refusing to grant defendants' request for a continuance during the course of the trial.

At the time of the trial, Marylou Zschach was also involved in an ongoing dispute involving an adoption proceeding. Marylou is the adoptive mother of a child whose biological mother is a person named Nan Barnaby. Defendants obtained a continuance of the trial date from August 24, 1995 to November 6, 1995 based upon an alleged physical altercation between Marylou and Ms. Barnaby.

During the course of the trial, Ms. Barnaby entered the courtroom, sat down and observed the proceedings. A sidebar was held, at which time defense counsel requested that the trial court either remove Ms. Barnaby from the courtroom or continue the trial to a later date. The trial court denied defense counsel's request on the grounds that the trial had already been continued once based on the alleged physical altercation between Marylou and Ms. Barnaby. The trial court also noted that the adoption proceeding is totally unrelated to the instant case. Furthermore, the court noted that Ms. Barnaby had not exhibited any disruptive behavior during the trial

and reserved the right to have her removed should she disrupt the proceedings. In addition, the court indicated that a deputy sheriff would be called to the courtroom for the duration of the proceedings to provide a sense of safety to the parties and witnesses. The court also cited the principle that the legal system in the United States is based upon public access to judicial proceedings.

As previously noted, the decision whether to grant a continuance is left to the sound discretion of the trial court. *Hartt, supra.* Absent an abuse of that discretion, this court will not overrule a trial court's decision. The reasons cited by the trial court in refusing to continue the trial clearly demonstrate that the court's attitude was not unreasonable, arbitrary or unconscionable. *Blakemore, supra.* Thus, we cannot find that the trial court abused its discretion in refusing to continue the trial. Accordingly, the fifth assignment of error is overruled.

By the sixth assignment of error, defendants assert that the trial court erred in admitting "any documents signed by Albright."

During the presentation of plaintiff's case-in-chief, several documents related to plaintiff's representation of defendants were identified and discussed by Albright during his direct testimony. These documents were offered as evidence of the attorney-client relationship and as proof of the services rendered by plaintiff on behalf of defendants. At the conclusion of their case-in-chief, plaintiff's counsel moved to admit these documents into evidence. Defense counsel objected to the admission of "any documents that have been signed by Mr. Albright, except those which I have offered into evidence * * * " on the

basis that the documents contained "self-serving statements."

It is well-established that the admission and/or exclusion of evidence rests within the sound discretion of the trial court. Thus, this court will not reverse the trial court, absent a clear and prejudicial abuse of discretion. *O'Brien v. Angley* (1980), 63 Ohio St.2d 159, 153; Evid.R. 403(B).

Defendants argue that the admission of the documents constitutes an abuse of discretion. However, defendants only contend that the documents should not have been admitted because there are "self-serving." However, no challenge was made to the authenticity of the documents and the documents have some relevance to the issue of what services were performed by plaintiff on behalf of defendants. The documents were admissible into evidence; the contention that they are "self-serving" bears upon the weight to be accorded to them by the trier of of fact and not to their admissibility. Thus, we find no abuse of discretion in the admission of the documents. Accordingly, the sixth assignment of error is overruled.

By the seventh assignment of error, defendants contend that the trial court abused its discretion in refusing to allow Marylou Zschach to refresh her recollection by referring to her notes.

Immediately after Marylou began her direct testimony, defense counsel presented her with a document composed of 110 numbered paragraphs, which had previously been prepared by her. Plaintiff's counsel objected on the grounds that the document appeared to be her

prerecorded testimony, rather than a document to be used to refresh her recollection.

Evid.R. 612 states, in pertinent part:

> " * * * [I]f a witness uses a writing to refresh his memory for the purpose of testifying, either: (1) while testifying; or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing. He is also entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. * * * "

The practice of refreshing a witness' recollection with a writing at trial is well-established in Ohio. Staff Note to Evid.R. 612. Under the doctrine of "present recollection refreshed," the witness "looks at the memorandum to refresh his memory of the events, but then proceeds to testify upon the basis of his present independent knowledge." *State v. Scott* (1972), 31 Ohio St.2d 1, 5-6.

In *Dayton v. Combs* (1993), 94 Ohio App.3d 291, the Second District Court of Appeals discussed the proper circumstances under which a witness may refer to a writing in order to refresh his or her recollection. The court stated:

> "Prior to employing a writing to refresh the recollection of a witness, it must be established that the witness lacks a present recollection of the information or events described in the writing. The propriety of the form of the questions employed to establish this lack of present recollection is largely within the discretion of the trial court. Once the trial court is satisfied that

> the witness has no present recollection of the relevant information or events, the witness is permitted to read the writing silently or have relevant portions thereof read to him. * * * If his recollection has been revived, he may then continue with his testimony." *Id.* at 297-298.

Thus, it is clear that before a writing may be used to refresh a witness's recollection, the memory of the witness must be exhausted, or nearly exhausted. *State v. Price* (1979), 60 Ohio St.2d 136, 139; 1 Gianelli and Snyder, Evidence (1996) 572, Section 612.4. In addition, the extent to which a party may refresh the recollection of its own witness is within the sound discretion of the trial court. *State v. Stearns* (1982), 7 Ohio App.3d 11, 16.

Although defense counsel was clearly entitled to utilize the document to refresh Marylou's recollection, no proper foundation was laid to establish that her memory was exhausted or nearly exhausted. The trial court could not have been satisfied that Marylou had no present recollection of relevant facts or events, as defense counsel asked Marylou to review the document immediately after she took the witness stand and before he asked her a single question. Under these circumstances, we cannot find that the trial court abused its discretion in refusing to allow Marylou to refresh her recollection in this manner. The seventh assignment of error is, therefore, overruled.

By the eighth assignment of error, defendants contend that the trial court abused its discretion in refusing to resume the direct testimony of Marylou Zschach.

It is well-established that a trial court has wide discretion in controlling the orderly progress of a trial. *Blosser v. Carter* (1990), 67 Ohio App.3d 215, 221. Marylou was given ample opportunity to present her direct testimony. Furthermore, it became apparent to the trial court that Marylou's testimony was straying from the relevant issues in the case. As stated in *Blosser*, "the keeping of * * * witnesses, within the just limits of the issues and the competent evidence thereon, and their conduct pertinent thereto, must be left to the sound discretion of the presiding judge." *Id.*, citing *Logan v. Cleveland Ry. Co.* (1923), 107 Ohio St. 211, 222. Moreover, defense counsel voluntarily concluded his questioning. Thus, we are unable to conclude that the trial court abused its discretion in refusing to allow defense counsel to resume the direct testimony of Marylou. Accordingly, the eighth assignment of error is overruled.

By the ninth assignment of error, defendants contend that the trial court abused its discretion in striking portions of James Graham's testimony.

At trial, Graham was asked, based on his own "personal knowledge," if he knew who Albright was representing. Graham responded by stating that Albright was representing Upper Arlington. Counsel for plaintiff objected on the grounds that Graham's further explanation of this testimony actually established that he had no real "personal knowledge" that Albright represented Upper Arlington, and that he had drawn such a conclusion only from the behavior he claims to have witnessed.

Evid. R. 602 states:

> "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. * * * "

Clearly, Graham was not competent to testify as to whether Albright was representing Upper Arlington since there was no foundation laid to establish that Graham had personal knowledge of Albright's relationship with Upper Arlington. Graham's testimony refers only to the behavior exhibited by Albright in his dealings with defendants and that, because of this behavior, he concluded that Albright was representing Upper Arlington. Since Graham's testimony amounted to nothing more than his "belief" that Albright was not representing the interests of the trust, we cannot conclude that the trial court abused its discretion in striking this testimony, especially in light of the fact that this case was tried to the court. Indeed, defendants admit in their brief before this court that "[i]n a non-jury trial, it wasn't unexpected that the court would strike this portion of the testimony."

Moreover, pursuant to Evid.R. 103(A):

> "**Effect of Erroneous Ruling**. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected * * * ."

Given that there was a significant amount of similar testimony offered by defendants to corroborate Graham's testimony and, given that the trial court in ruling against

defendants apparently found such testimony to be incredible, we cannot conclude that the exclusion of Graham's testimony affected defendants' substantial rights. Accordingly, the ninth assignment of error is overruled.

By the tenth assignment of error, defendants contend that the trial court abused its discretion in refusing to admit into evidence an audiotape.

In an attempt to prove their malpractice claim, defendants sought to prove that Albright and Upper Arlington conspired to convince defendants to sell their property to Compuserve. Defendants alleged that as part of this conspiracy, Albright told defendants that Upper Arlington had threatened to "take" defendants' property in an eminent domain proceeding.

During defendants' case-in-chief, Marylou testified that she received a telephone call from Albright on November 5, 1992, demanding that she meet him at the Upper Arlington city offices because Upper Arlington had scheduled an emergency meeting to take defendants' property by eminent domain. Marylou further testified that it was because of this threat that she decided to sell the property to Compuserve rather than allow the property to be taken by Upper Arlington.

Later in her direct testimony, Marylou stated that she had a subsequent telephone conversation with Albright in which he denied that any threat of an eminent domain proceeding had been made. At this end of this testimony, Marylou alluded to having "my own proof" that the

alleged threat had actually been made. However, no further mention was made of the alleged "proof" during the remainder of her direct testimony.

On redirect, defense counsel attempted to introduce into evidence an audiotape of an alleged telephone conversation and requested that the trial court review the tape in camera. However, at this point in the proceedings, no identification was made as to either the participants in or the date of the alleged conversation, nor did defense counsel offer an explanation as to the content of the recording or its relevance to the proceedings. The trial court indicated that it would rule on the admissibility of the tape at a later time.

On rebuttal, counsel for plaintiff called the Upper Arlington City Attorney, Sharon Pfancuff, who testified that the purpose of the November 5, 1992 meeting was to explain to Marylou the annexation process and proposed zoning changes that were set to occur in the near future. Pfancuff denied, however, that any discussion regarding an eminent domain proceeding occurred at this meeting.

Thereafter, defense counsel called Marylou as a surrebuttal witness and again attempted to introduce the audiotape into evidence after identifying the participants as Marylou and Albright and describing the conversation as an admission by Albright that Upper Arlington was threatening defendants with an eminent domain proceeding. However, the date of the telephone conversation was not provided. The trial court refused to admit the tape on surrebuttal on the grounds that defense counsel should have brought it up during defendants' case-in-chief. As

noted previously, the admission and/or exclusion of evidence rests within the sound discretion of the trial court. This court will not reverse the trial court absent a clear and prejudicial abuse of discretion. *O'Brien, supra.*

Defendants argue that the exclusion of the surrebuttal evidence constitutes an abuse of discretion and cite *Phung v. Waste Mgt., Inc.* (1994), 71 Ohio St.3d 408, for the proposition that they have an unconditional right to present surrebuttal evidence. The *Phung* court noted:

> "A party has an unconditional right to present rebuttal testimony on matters which are first addressed in an opponent's case-in-chief and should not be brought in the rebutting party's case-in-chief. See *Katz v. Enzer* (1985), 29 Ohio App.3d 118 * * * ." *Id.* at 410.

The *Phung* court concluded that a party possesses an unconditional right to present rebuttal evidence if: 1) the evidence is not cumulative; 2) the evidence would not be appropriate for one's case-in-chief; and 3) the evidence is first addressed in an opponent's case-in-chief.

Defense counsel's attempt to introduce the audiotape on surrebuttal was inappropriate. The alleged threat of eminent domain was not addressed in plaintiff's case-in-chief; rather it was raised for the first time in defendants' case-in-chief. Marylou testified to the alleged conversation during her direct testimony and alluded to the tape's existence during her testimony; however, for unspecified reasons, defense counsel failed to introduce the audiotape at this time. Defense counsel should have attempted to introduce the tape at this stage in the proceeding in order to support Marylou's claims. Defense counsel's untimely attempt to introduce this evidence cannot now be claimed

an abuse of discretion on the part of the trial court. Accordingly, the tenth assignment of error is overruled.

By the eleventh assignment of error, defendants contend that the trial court erred in dismissing trustee Margaret Sloan as a defendant. At the conclusion of plaintiff's case, counsel for Margaret Sloan moved for dismissal of the claims against her on the grounds that, since plaintiff had presented no evidence to establish that she had retained Albright or the Lucas law firm, she could not be held personally liable for the debts incurred as a result of plaintiff's representation of defendants. Plaintiff's counsel agreed and the trial court sustained the motion. Defense counsel offered no objection at this time.

Subsequently, however, at the conclusion of the trial, defense counsel objected to Slone's dismissal. In *State v. Williams* (1977), 51 Ohio St.2d 112, the Supreme Court of Ohio held:

> "An appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. (Paragraph one of the syllabus of *State v. Glaros*, 170 Ohio St. 471, approved and followed.)" *Id.* at paragraph one of the syllabus.

This court will not consider defendants' claim of error, as the objection was not made at a time when any alleged error in dismissing Sloan could have been corrected by the trial court. Defense counsel's argument that he was not asked by the trial court at the time the motion was made whether he agreed with Sloan's dismissal is not well-taken. If counsel had any objections to Sloan's

dismissal, he should have raised such objections at the time the motion to dismiss was made, whether asked by the trial court or not, so that Sloan's counsel would have been afforded an opportunity to respond. Accordingly, the eleventh assignment of error is overruled.

By the twelfth assignment of error, defendants contend that the trial court erred in overruling their motion to dismiss for lack of subject matter jurisdiction.

On August 11, 1995, defendants filed a motion to dismiss for lack of subject matter jurisdiction, arguing that the Franklin County Court of Common Pleas, Probate Division, had exclusive jurisdiction over this matter. Plaintiff filed a memorandum contra; the trial court overruled defendants' motion on October 11, 1995.

Thereafter, just prior to opening statements in the trial of this case, defense counsel voluntarily withdrew the motion to dismiss for lack of subject matter jurisdiction. It is well-established that the issue of subject matter jurisdiction cannot be waived and may be raised at any time during the proceedings. *In re Byard* (1996), 74 Ohio St.3d 294, 296. However, having withdrawn their motion, defendants cannot now claim that the trial court erred in overruling the motion. Accordingly, the twelfth assignment of error is overruled.

By the thirteenth assignment of error, defendants contend that the judgment of the trial court is against the manifest weight of the evidence. Specifically, defendants take issue with several of the factual findings made by the trial court. In reviewing this assignment of error, this court must be guided by the presumption that the findings of a trial court are correct, as the trial judge " * * * is

best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony. * * * " *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. Furthermore, "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, syllabus.

Defendants first contend that the trial court erred in concluding that they had not proven any damages and that plaintiff's actions were the proximate cause of any damages. However, testimony presented by defendants themselves support the trial court's finding. Specifically, when asked by the court to explain the monetary effect of the loss of the Compuserve contract, Marylou Zschach testified that there was "no financial loss." Thereafter, when asked by defense counsel to describe any monetary damages, *i.e.*, loss of bargains, non-use of the property, attorney fees, etc., incurred as the result of Albright's representation, Marylou responded by stating that the damages were "pretty hypothetical." Thus, defendants' own testimony convinces this court that the trial court did not err in finding that defendants' did not present any competent, credible evidence of damages.

Defendants next challenge the trial court's finding that the ethical violations committed by Albright did not amount to acts of legal malpractice. Defendants' argument is based on the faulty premise that the trial court found that Albright had committed an ethical violation. Contrary to defendants' assertion, the trial court did not

find that Albright had committed any ethical violations. Rather, the trial court merely noted in its findings of fact that defendants' expert witness testified that, in his opinion, Albright had committed an ethical violation during his representation of the trust; however, the trial court went on to find that this testimony was based on alleged facts that were not presented as evidence in the instant case. Thus, since the trial court found that there was no credible evidence to support defendants' assertion that Albright's conduct in representing the trust constituted an ethical violation, we cannot find that the trial court erred in determining that his conduct did not constitute legal malpractice.

Defendants next challenge the trial court's finding that defendants retained new legal counsel with respect to the same matters for which plaintiff was retained. The record contains competent, credible evidence to support this finding. After apparently becoming dissatisfied with the legal services rendered by Albright, defendants retained the legal services of another law firm in connection with the sale of the trust property. Testimony offered by one of the partners of the second law firm established that the firm was retained to evaluate the provisions of the existing contract with Compuserve, to ensure that defendants' interests were protected and to make recommendations regarding available alternatives. The fact that the second law firm was required to provide somewhat different legal services, or even corrective legal services, does not change the fact that defendants' ultimate goal in retaining both law firms was to represent them in the sale of the trust property. Thus, the trial court did not err in

finding that both law firms were retained with respect to the same matters.

Defendants also challenge the trial court's finding that plaintiff's representation of defendants was initiated by defendants. Albright testified that Marylou initially contacted him by telephone regarding the sale of the property. Defendants admit this fact in their brief to this court. At the time of the initial contact, Albright informed defendants that, due to a conflict of interest, he could not represent them. After the conflict was resolved, Albright called defendants and indicated that he could now represent them. Although Albright was not retained until after this second conversation, the fact remains that the initial contact between plaintiff and defendants was made by defendants. Thus, there is competent, credible evidence to support the trial court's finding.

Finally, defendants take issue with the trial court's finding that Albright was not terminated until September 23, 1993. Albright testified that he was terminated by letter dated September 23, 1993, and that he had not been orally terminated prior to that date. Although Marylou testified that she had orally terminated Albright some time earlier, she could not provide the place, time, or date on which the alleged termination occurred. The trial court was not required to accept the testimony of Marylou regarding the termination date. Indeed, the weight to be given evidence and the credibility of witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Since the record contains competent, credible evidence to support the trial court's finding that Albright was not terminated

until September 23, 1993, we may not reverse the trial court's finding.

Having determined that there is competent, credible evidence to support the trial court's findings, we conclude that the trial court's judgment is not against the manifest weight of the evidence. Accordingly, the thirteenth assignment of error is overruled.

For the foregoing reasons, defendants' assignments of error are overruled and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

CLOSE, J., concurs.

LAZARUS, J., concurs in part and dissents in part.

LAZARUS, J., concurring in part and dissenting in part.

Being unable to agree with the majority opinion as it addresses the third assignment of error, I respectfully dissent from that portion of the majority opinion.

The majority concludes that defendants' claims for intentional and negligent infliction of emotional distress and defamation were derivative of defendants' underlying claim for legal malpractice and, therefore, could not have survived independently.

However, as the majority observed, the transcript of the trial reveals that the trial court, as well as all parties to the action, were under the impression that the defendants' claims for emotional distress and defamation had been severed from this action:

"THE COURT: * * *

"I would like to know, and briefly, before we close for the day, my understanding of this litigation is that Mr. – it's contractual in nature. There's a claim for negligent infliction of emotional distress. I'd like to know how you get that out of a contract.

"MR. SHULER: Your Honor, that claim is not in the case, if you look at the rulings that you made at the time –

"THE COURT: Oh, I did, okay. Well, tell me what is in the case.

"MR. SHULER: As far as we're concerned, our claim for attorney fees and a counterclaim that's based on alleged malpractice. I mean, the malpractice claim is founded largely in what appeared to me to be sort of ethical violation type claims, but malpractice.

"THE COURT: I understand. Okay. " * * *

"MR. HEATH: – we wanted to – initially we wanted to – if the Court will look at its record, we wanted the trustees, especially the 83-year-old Florence Zschach, and Marylou Zschach, to get personal, to sue him personally for damages for intentional infliction of mental disturbance, mainly, you know, this [*sic*] threats, so forth, that make them sick, with malice.

"And the other thing was to sue them for slander, the reports to the press and so forth, but you refused to allow that in the claim, so, you know, that's what I said in the beginning of this hearing that we wanted to reserve our objection on those matters. So right now as the case now

> stands it's true it's not in the case, those personal damages.
>
> "THE COURT: All right. We're adjourned." (Tr. Vol. I, pp. 230-232.)

Thus, I would conclude that because the trial court's rulings concerning defendants' claims for emotional distress and defamation were at best ambiguous, this cause should be remanded to the trial court for proceedings concerning these claims. Because the defendants were denied the opportunity to present their evidence on these claims, it is impossible for this court to know whether those claims were derivative (as assumed by the majority) or not. Accordingly, I would sustain the third assignment of error.